EXHIBIT D
Part IV of V

H. L. (E.) 1942 LONDON PASSENGER TRANSPORT BOARD v. MOSCROP. Lord Porter.

whereby he was liable to be placed at a disadvantage as compared with others. The section is, I think, dealing with the terms of a man's employment, not with the decisions which the employer may take from time to time in individual cases. In coming to a decision to refuse representation he is merely relying on the general law that there is no obligation on an employer to let his employee be represented on a matter of discipline, and reliance on the general law is not, in my view, the imposition of a condition. (2.) I think, as indeed I believe all your Lordships think, that it is unfortunate that so great a change between the remedy asked and that given by the Court of Appeal should have been made without the appropriate amendment in the pleadings. These, however, are minor matters, and for the reasons which I have given I would allow the appeal.

Solicitors for appellants: *Solicitor to London Passenger Transport Board.*

Solicitors for respondent: *Cole & Matthews.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)* 1941 Oct. 28, 30, 31; Nov. 4, 6. 1942 Feb. 20.

HEYMAN AND ANOTHER . . . . . APPELLANTS;

AND

DARWINS, LIMITED . . . . . RESPONDENTS.

Arbitration—Contract—Repudiation—Any dispute arising "in respect "of this agreement"—Scope of arbitration clause.

When an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise "in "respect of" or "with regard to" or "under the contract" shall be referred to arbitration, and the parties are at one in asserting that they entered into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract. *Secus*, generally, if the point

* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

in dispute is whether the contract containing the clause was ever entered into at all or was void ab initio, for example, because the making of it was illegal.

Observations of Lord Loreburn L.C. and Lord Shaw in *Johannesburg Municipal Council* v. *D. Stewart & Co.* (1902), *Ld.*, 1909 S. C. (H. L.) 53, at pp. 54, 56; and of Viscount Haldane L.C. in *Jureidini* v. *National British and Irish Millers Insurance Co., Ld.* [1915] A. C. 499, at p. 505, not adopted. Decision of the Judicial Committee of the Privy Council in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* [1926] A. C. 497, questioned.

An arbitration clause in a contract provided that "if any "dispute shall arise between the parties hereto in respect of this "agreement or any of the provisions herein contained or anything "arising hereout the same shall be referred for arbitration in "accordance with the provisions of the Arbitration Act, 1889." A dispute having arisen between the parties, the appellants commenced an action against the respondents claiming (*a*) a declaration that the respondents had "repudiated and/or evinced "an intention not to perform" the contract and (*b*) damages. The respondents, who admitted the existence of the contract and denied that they had repudiated it, applied to have the action stayed in order that it might be dealt with under the arbitration clause:—

Held, that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

APPEAL from the Court of Appeal.

The facts were stated by Viscount Simon L.C. as follows:

By a written contract dated February 19, 1938, the respondents, manufacturers of steel in Sheffield, as principals appointed the appellants, whose business address was in New York, to be sole selling agents of their tool steels in a wide area of territories including the western hemisphere (excluding U.S.A. and Argentine), Australia, New Zealand and India. The appellants were to sell in the name of the respondents, the respondents fixing f.o.b. prices and the appellants charging the purchaser with such excess price over f.o.b. prices as they could obtain. Any excess price over the f.o.b. price was for the credit of the appellants and the respondents were to account to the appellants in respect of such excess price after the respondents had received payment in full from the purchaser. The duration of the agreement was to be for three years from April 1, 1938, as a minimum. The agreement contained an arbitration clause in the following terms: "If any dispute shall arise between the parties hereto "in respect of this agreement or any of the provisions herein "contained or anything arising hereout the same shall be "referred for arbitration in accordance with the provisions of

Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation. Suppose the injured party prefers to have his claim of damages for the other party's total breach assessed by arbitration, can he not invoke and enforce the arbitration clause for that purpose? Can he be effectually met by a plea on the part of the wrongdoer that the wrongdoer has repudiated the contract and with it the arbitration clause which is consequently no longer operative? I do not think that this result follows even if the injured party acquiesces in the total breach—accepts the repudiation, as it is put—and contents himself with his claim of damages. I think he is entitled to insist on having his damages assessed by arbitration notwithstanding the other party's repudiation.

I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both

(H. L. (E.) 1942 HEYMAN v. DARWINS, LD. Lord Macmillan.)

parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.

I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

There still remains the difficulty raised by the dicta of Lord Shaw and Lord Haldane which I have quoted. It is said to be wrong to allow a party to a contract who has refused to perform his obligations under it at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma, but with the greatest respect I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them and at the same time asking the other to join with him in a reference under an

House of Lords

Lesotho Highlands Development Authority *v* Impregilo SpA and others

[2005] UKHL 43

2005 May 9, 10; June 30

Lord Steyn, Lord Hoffmann, Lord Phillips of Worth Matravers MR, Lord Scott of Foscote and Lord Rodger of Earlsferry

Arbitration — Award — "Serious irregularity" — Contract stipulating currency of account and applicable law — Tribunal making award in different currency — Pre-award interest ordered by reference to procedural law of arbitration rather than applicable law of contract — Whether errors of law — Whether excess of power — Arbitration Act 1996 (c 23), ss 48(4), 49(3), 68

In 1991 the employer, a public authority in the Kingdom of Lesotho, engaged the contractors, a consortium of seven companies from England, Italy, Germany, France and South Africa, to construct a dam in Lesotho. The law of the contract was stated to be that of the Kingdom of Lesotho and the currency of account was to be Maloti, with provision for payments to be converted into the contractors' currencies at the exchange rates applicable on a specified date, namely 42 days before the closing date for submission of tenders. The contract provided for disputes to be referred to arbitration under the International Chamber of Commerce ("ICC") Rules of Conciliation and Arbitration 1987 and excluded any appeal on points of law under section 69 of the Arbitration Act 1996. The project was successfully completed but a dispute arose in respect of claims by the contractors for reimbursement of increased costs. The employers rejected the claims and they were referred to ICC arbitration in London. The arbitrators decided that sums totalling 18.9m Maloti should have been paid by the employer. However, between the date when the payments should have been made and the date of the award the value of the Maloti had fallen heavily and the arbitrators, in purported reliance on the power under section 48(4) of the 1996 Act[1] to make an award "in any currency", ordered payment in the contractors' own currencies converted from Maloti at the rate prescribed in the contract, which pre-dated the Maloti's collapse. The arbitrators also held that they were entitled under section 49(3) of the Act to award interest from when the sums had been due to the date of the award. The employers, believing that the provision in the contract for payments to be made in Maloti precluded the use of section 48(4) and that the choice of Lesotho law as the substantive law of the contract precluded the award of pre-award interest under section 49(3), sought an order from the judge quashing or remitting the decision as being a serious irregularity causing them substantial injustice within section 68 of the Act, namely an excess of power under section 68(2)(b). The judge held that the arbitrators had exceeded their powers by expressing the award in currencies other than those stipulated in the contract and by awarding interest in circumstances not permitted under Lesotho law. The Court of Appeal upheld the judge's decision.

On appeal by the contractors—

Held, allowing the appeal, that a decision by arbitrators that amounted to no more than an error of law involved no excess of power under section 68(2)(b) of the 1996 Act; that (Lord Phillips of Worth Matravers MR dissenting) the tribunal's decision as to the currency of the award could have amounted to no more than an erroneous exercise of the power available to arbitrators under section 48(4) and

[1] Arbitration Act 1996, ss 48(4), 49(3): see post, para 2.
S 68: see post, para 28.

therefore an error of law rather than an excess of power within section 68(2)(b); that the arbitrators' award of interest could not be impugned since the employer had not established the pre-condition of substantial injustice necessary for a complaint under section 68 and since, in any event, the arbitrators' power under section 49(3) to award interest had not been expressly excluded by the parties and, even if exercised erroneously, would have been no more than an error of law outside section 68(2)(b); and that, accordingly, the arbitrators' award would stand (post, paras 23–24, 32–33, 35–36, 39, 42–43, 55–56).

Decision of the Court of Appeal [2003] EWCA Civ 1159; [2004] 1 All ER (Comm) 97 reversed.

The following cases are referred to in their Lordships' opinions:

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 2 WLR 163; [1969] 1 All ER 208, HL(E)

Attorney General of the Republic of Ghana v Texaco Overseas Tankships Ltd (The Texaco Melbourne) [1994] 1 Lloyd's Rep 473, HL(E)

Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep 44

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701; [1993] 3 WLR 42; [1993] 3 All ER 897, CA

Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] QB 292; [1973] 3 WLR 847; [1973] 3 All ER 498, CA

K/S A/S Bill Biakh v Hyundai Corpn [1988] 1 Lloyd's Rep 187

Miliangos v George Frank (Textiles) Ltd [1976] AC 443; [1975] 3 WLR 758; [1975] 3 All ER 801, HL(E)

Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA) (1974) 508 F 2d 969

Patel v Patel [2000] QB 551; [1999] 3 WLR 322, CA

Seabridge Shipping AB v AC Orssleff's Eftf's A/S [1999] 2 Lloyd's Rep 685

Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag Svea (The Despina R) [1979] AC 685; [1978] 3 WLR 804; [1979] 1 All ER 421, HL(E)

United Railways of Havana and Regla Warehouses Ltd, In re [1961] AC 1007; [1960] 2 WLR 969; [1960] 2 All ER 332, HL(E)

The following additional cases were cited in argument:

Alan (WJ) & Co Ltd v El Nasr Export & Import Co [1972] 2 QB 189; [1972] 2 WLR 800; [1972] 2 All ER 127, CA

Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240; [1950] 1 All ER 768

Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84; The Times, 12 February 2003, CA

Midland International Trade Services Ltd v Al-Sudairy (unreported) 11 April 1990, Hobhouse J

President of India v La Pintada Cia Navigacion SA [1985] AC 104; [1984] 3 WLR 10; [1984] 2 All ER 773, HL(E)

APPEAL from the Court of Appeal

This was an appeal, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood), by the contractors, Impregilo SpA, Hochtief AG, Bouygues SA, Kier International Ltd, Stirling International Civil Engineering Ltd, Concor Holdings (Pty) Ltd and Group Five Construction (Pty) Ltd, from the order of the Court of Appeal (Brooke and Latham LJJ and Holman J) dismissing their appeal from the decision of Morison J [2003] 1 All ER (Comm) 22 to allow an application by the employer, the Lesotho Highlands Development Authority, to set aside or remit to an arbitral tribunal (John Uff QC, John

Act made by the Departmental Advisory Committee, published in Arbitration International, vol 13, at p 275.)

"As this has been the actual achievement of the Act, it would in my view be a retrograde step if when a point arose reference had to be made to pre-Act cases. Reference to such cases should only generally be necessary in cases where the Act does not cover a point—as, for example, in relation to confidentiality or where for some other reason it is necessary to refer to the earlier cases. A court should, in general, comply with the guidance given by the Court of Appeal and rely on the language of the Act. International users of London arbitration should, in my view, be able to rely on the clear "user-friendly language" of the Act and should not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues where the provisions of the Act set out the law. If international users of London arbitration are not able to act in that knowledge, then one of the main objectives of the reform will have been defeated."

The reference to an earlier decision of the Court of Appeal is to *Patel v Patel* [2000] QB 551. I would respectfully endorse the observation in *Seabridge*.

XIII. The seat of the arbitration

20 The Act is engaged where the "seat" of the arbitration is in England and Wales or Northern Ireland: section 2(1). This is a reference to "the juridical seat" of the arbitration designated, inter alia, by the parties to the arbitration agreement: section 2. The determination of the juridical seat of the arbitration as England (as was done in the present case) is the gateway to the powers of the tribunal spelled out in many provisions of the Act. In setting out the powers of a tribunal the 1996 Act often uses the permissive expression "the parties are free to agree". Subject agreements to the contrary, the relevant powers in the present case are section 48(4) (currency) and section 49(3) (pre-award interest.)

XIV. The independence of the arbitration agreement

21 It is part of the very alphabet of arbitration law, as explained in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, 724–725, per Hoffmann LJ (now Lord Hoffmann) and spelled out in section 7 of the Act, that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract. It is in the arbitration agreement, read with the curial law, in this case the Arbitration Act 1996, that the powers of the tribunal are to be found and not in the underlying contract. In the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which under article 18 of the ICC rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement. The terms of reference too are a source of the powers of the arbitrator. This is the context in which the terms of reference in the present case expressly provided for the dispute to be settled in accordance with the provisions of the 1996 Act.

C. A. 1967

Reg. v. Cleghorn

LORD PARKER C.J.

Thompson, it became necessary for much more to be done; the defendant himself had to be recalled, counsel had to take further instructions, in fact two further defence witnesses were called who otherwise would not have been called, and the trial took on a completely different aspect.

While recognising that this rule of practice is only a general rule, and that there may be occasions to depart from it, this court can see no ground in the present case for so departing. Accordingly, the court has come to the conclusion, though it confesses with some reluctance, that this is a case in which the conviction must be quashed. So far therefore as this case is concerned at any rate, the prisoner is discharged.

Appeal allowed.
Conviction quashed.

Solicitors: *Lincolns; Director of Public Prosecutions.*

[COURT OF APPEAL]

C. A. 1966 *Oct.* 17, 18

LORD DENNING M.R., DIPLOCK and RUSSELL L.JJ.

MACKENDER AND OTHERS
v.
FELDIA A. G. AND OTHERS

[1966 M. No. 1584]

Practice—Writ—Service out of jurisdiction—Contract—Contract made within jurisdiction—Insurance policy with foreign jurisdiction clause—Proceedings on policy in Belgium—Writ claiming policy void issued in England—Whether leave should be granted to serve writ outside jurisdiction—R.S.C., Ord. 11, *r.* 1 (*f*).

Insurance—Non-disclosure—Effect—Alleged failure to disclose practice of smuggling in foreign country—Policy with foreign jurisdiction clause—Whether contract void ab initio—Whether clause binding.

Law Reform—Whether necessary—Conflict of laws—Jurisdiction of English courts on contracts subject to foreign jurisdiction by agreement.

By a contract made in London in 1964, the plaintiffs, Lloyd's underwriters, issued a jewellers' block insurance policy covering the defendants, who were diamond merchants incorporated respectively in three different European countries, against loss or

damage to their stock anywhere in the world. The policy contained a foreign jurisdiction clause providing that it should be governed exclusively by Belgian law and that any disputes thereunder should be "exclusively subject to Belgian jurisdiction."

In January, 1965, a loss of diamonds and pearls occurred in Naples. The defendants made a claim on the plaintiffs for £48,266, the loss. After investigations and negotiations, the plaintiffs rejected the claim, alleging that the defendants had made a practice of smuggling diamonds into Italy, that it was contrary to English policy to insure goods which were intended to be smuggled into a friendly foreign country and that the defendants had been guilty of non-disclosure of this practice. The defendants started proceedings in Belgium claiming payment of their loss of £48,266. Wanting the dispute to be tried in England, the plaintiffs issued a writ in England asking that the policy be declared void for illegality and voidable for non-disclosure, and that it be rescinded or annulled. The plaintiffs applied under R.S.C., Ord. 11, r. 1 (1) (*f*),[1] for leave to serve the writ on the defendants out of the jurisdiction.

On appeal by the defendants against the grant of leave to serve the writ out of the jurisdiction:—

Held, allowing the appeal, that as non-disclosure only made the contract void from the moment of avoidance and illegality only made it unenforceable, the dispute remained within the foreign jurisdiction clause and as the plaintiffs had agreed to that clause the discretion of the court should not be exercised to give leave to serve the writ out of the jurisdiction.

Per Diplock L.J. The jurisdiction which the High Court claims over defendants who are neither present nor ordinarily resident in this country, when it grants leave under R.S.C., Ord. 11, is a claim which conflicts with the general principles of comity between civilised nations, and it is one which should be exercised with caution (post, p. 599D–F). The prima facie rule of English conflict of laws is that the proper law of a contract is that system of law which the parties have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise. Here the parties expressly agreed that the proper law of the policy should be Belgian law (post, p. 602A–B).

Decision of McNair J. reversed.

APPEAL from McNair J.

The plaintiffs, Leslie Stanley Mackender, Clarence Roy Hill and Anthony Stewart Clifford White, claimed by writ dated

[1] R.S.C., Ord. 11, r. 1: "(1) . . . service of a writ, or notice of a writ, 'out of the jurisdiction is permissible with the leave of the court in the following cases, that is to say . . . (*f*) if the action begun by the writ is brought against a defendant . . . to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—(i) was made with the jurisdiction. . . ."

C. A. 1966

Mackender v. Feldia A. G.

April 29, 1966, against the defendants, Feldia A.G. and Ch. Brachfeld and Sons S.A. and Diamil S.R.L., (1) a declaration (a) that the purported contract of insurance contained in Lloyd's Policy No. 159541 dated June 22, 1964, was void for illegality and/or (b) that the plaintiffs were entitled to avoid the contract on the ground of non-disclosure of a material fact or facts; (2) rescission or annulment of the said contract and/or delivery up or cancellation of the said contract; (3) further or other relief. The plaintiffs claimed on behalf of themselves and all other underwriters subscribing the said policy. On May 2, 1966, Roskill J. granted the plaintiffs leave ex parte to serve the writ out of the jurisdiction. On July 28, 1966, McNair J., after hearing the defendants, affirmed the decision of Roskill J. The defendants appealed from the order of McNair J. and sought an order that the order of Roskill J., the writ of summons issued pursuant thereto, the service of the notice and all subsequent proceedings be set aside, or, alternatively, an order that all further proceedings be stayed.

The grounds of appeal were, inter alia, that: the matters in issue fell within the scope of the contractual provision conferring sole jurisdiction on the Belgian courts; the judge erred in assuming that the Belgian courts might not have jurisdiction to determine the issues in the action; the judge erred in holding that no undue inconvenience would result from allowing the action to continue, notwithstanding that proceedings under the policy were already in progress in Belgium; the plaintiffs should not be permitted to invoke the jurisdiction of the English court for the purpose of claiming a negative form of relief founded on considerations of English public policy, when an action claiming a positive form of relief was being prosecuted in the court of a foreign friendly state to which the parties had agreed to refer their disputes; the discretion conferred by R.S.C., Ord. 11, should be exercised with caution and in all the circumstances leave under Ord. 11 should not have been granted; (alternatively) the parties had expressly agreed to submit disputes arising under the policy to the jurisdiction of the Belgian court and no sufficient reason had been shown why effect should not be given to that agreement.

The facts are stated in the judgment of Lord Denning M.R.

Robin Dunn Q.C. and *M. J. Mustill* for the defendants. This contract if it is illegal at all is only illegal because it is contrary to English public policy. The facts of this case are not contrary to English public policy. A breach of the revenue laws of another

country is not illegal by the laws of this country. In any case the contract was not void at its outset but was merely unenforceable in this country. What better forum is there to decide the issue than the forum provided by the contract, the Belgian courts?

The power under R.S.C., Ord. 11, to give leave to serve outside the jurisdiction should be exercised with great caution. It is unpopular abroad: see *per* Scott L.J. in *George Munro Ltd.* v. *American Cyanamid & Chemical Corporation* [2] and *per* Winn J. in *Cordova Land Co. Ltd.* v. *Victor Brothers Ltd.*[3] Where the parties have by their contract agreed to submit all disputes to a foreign court, that is a strong reason for refusing leave to serve outside the jurisdiction.

The invalidity which is alleged here falls to be determined by Belgian law: see Cheshire & Fifoot Law of Contract, 5th ed. (1960), p. 302. The acts alleged as amounting to illegality are merely a breach of another country's revenue laws and do not amount to illegality: see Dicey's Conflict of Laws, 7th ed. (1958), p. 162.

The question of non-disclosure is essentially one for the Belgian court. Rescission even in English law is not an appropriate remedy where the claim is based on non-disclosure. Rescission involves restitutio in integrum. Non-disclosure gives the right to repudiate. Rescission is an equitable remedy putting the parties back in their original position: see Halsbury's Laws of England, 3rd ed., Vol. 22 (1958), p. 192. If you take away the claim for rescission here, you leave a claim for a bare declaration of non-liability.

R. A. MacCrindle Q.C. and *Anthony Lloyd* for the plaintiffs. The writ claims two forms of relief with one thing in common: they both attack an apparent contract ab extra. They attack it for faults which the plaintiffs say prevent an unimpeachable contract from coming into existence. If an insurer hears of the non-disclosure of a material fact he is entitled in English law to avoid the contract ab initio: see Arnould on Marine Insurance, 15th ed. (1961), Vol. 2 (British Shipping Laws, Vol. 10), para. 551, p. 522. Here the insurers have elected to treat the contract as void both by letter and by writ. If they are right in doing this there is no contract and there was no contract when the Belgian proceedings were started. So the relations between the parties are no longer governed by the contract at all.

The plaintiffs seek to rely on a pre-contractual state of affairs which entitles the insurers to say "there is no contract." If they

[2] [1944] K.B. 432, 437; 60 T.L.R. 265, 266; [1944] 1 All E.R. 386, 388, C.A.

[3] [1966] 1 W.L.R. 793, 796.

C. A. 1966

Mackender v. Feldia A. G.

are right, English law considers the position on the footing that there is no contract. Like fraud, non-disclosure in insurance matters renders the contract voidable, an "apparent contract" is rendered voidable: see *per* Lord Porter in *Heyman* v. *Darwins Ltd.*[4] The law appears to be that if there is any hint of fraud the premium is not recoverable.

The second form of relief claimed is that this apparent contract was of no effect because it was from the inception an illegal contract. In principle it would be a strange thing if a venture involving smuggling goods into a friendly country contrary to its law could be insured against in English law. If the underwriters are correct it will not be open to the defendants to insist that they can rely on certain clauses in the contract such as the foreign jurisdiction clause.

The first question is to classify the problem, whether in tort or contract. English courts will apply English standards to do this. Is this a case where there is a true consensus amounting to a contract? Take a mistake making a contract void; suppose this contract contains a Belgian jurisdiction clause: that would be precisely this position. To say "this policy is governed by Belgian law" assumes that there is a policy; but the plaintiffs say that there is no contract, no collateral clause. The court is being asked to annul this contract; if the court does so, there is no contract.

The law with which this transaction has the closest connection is English law. Cheshire's Private International Law, 7th ed. (1965), p. 203, refers to the "putative proper law," i.e., the law which would be the proper law in the objective sense assuming the contract had been effectively created; and if this is correct, English law applies. Suppose a foreign seller makes an offer to an English potential buyer, open for seven days, knowing that by Panamanian law an offer which is not refused in seven days is deemed to be accepted and inserts a clause "subject to Panamanian law," and the English buyer knows nothing of this and does not accept in seven days: could the foreigner sue in a Panamanian court and say there is no contract? The parties are not free to choose what law governs "the valid creation of a contract": Cheshire's Private International Law, 7th ed., p. 203. "The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded": Dicey's Conflict of Laws, 7th ed., p. 766, rule 160. Here the parties have been completely

[4] [1942] A.C. 356, 392; 58 T.L.R. 169; [1942] 1 All E.R. 337, H.L.

silent as to what law decides whether there is a contract. The parties ex hypothesi would not have agreed to the clause in the contract dealing with the effect of Belgian law, but for the existence of the fact which vitiated the contract.

The court must look at the apparent contract and then determine whether an apparent contract of that type, i.e., insurance, has been created by English law. Unless the parties have agreed in the apparent terms of this contract there is no contractual agreement; it is a nullity. Although the plaintiffs were entitled to treat it as a valid contract, they have elected not to do so. As a result of the letters they wrote and the writ, there is no policy. The passage cited from Arnould shows that the effect of the election is that there is no contract, the contract is avoided ab initio. There was a defective consent to the contract, because the mind of one party did not go with it because of the non-disclosure of a material fact.

There are a number of other matters which militate against setting aside service of the writ. If the court does set aside service, suppose the underwriters took no part in the Belgian proceedings, or protested to the jurisdiction, and a judgment was entered in a Belgian court for the amount claimed: it could not be sued on here, but could only be enforced by registration as a foreign judgment. It would be open to the underwriters here to apply to set aside the registration of the foreign judgment on the grounds that the Belgian court had no jurisdiction and of illegality. The matter would then have to be litigated here. The underwriters do not want the case tried in Belgium, because England is the only country where the issue, the defence of English public policy, can be tried. As to the effect of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, see Cheshire on Private International Law, 7th ed., p. 542 onwards. It is almost inconceivable that the underwriters could rely on English public policy in the Belgian courts. So if service of the writ were set aside, the matter could well be relitigated. Virtually all the evidence would come from England. All the surrounding circumstances support the desirability of an English forum. The plaintiffs got their blow in first.

As to illegality, this is an "all risks" policy. The courts have held collateral contracts to be tainted.

[RUSSELL L.J. Would Lloyd's be entitled to repudiate a policy on a car because it was sometimes used for poaching?]

If the car is used for an illegal purpose, yes. A smuggler is engaged in a criminal activity for which he can be caught and

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punished. The underwriters attach considerable importance to the issue of illegality and if the case were dealt with by the Belgian courts, the question of illegality would very likely be raised if any Belgian judgment were enforced here under the Act of 1933. The Belgian court is at present awaiting the result of these proceedings.

Dunn Q.C. in reply. As to the Foreign Judgments (Reciprocal Enforcement) Act, 1933, the Belgian proceedings should be allowed to go on and if the underwriters subsequently want to take the point of illegality, then let them. To hold that conduct of the kind alleged here would be contrary to public policy, would be extending public policy unduly. As to non-disclosure, this is not a non est factum case; if it were, the argument might have relevance. Non-disclosure is different from fraud and misrepresentation. Reliance is placed on the way in which the effect of non-disclosure is put in Halsbury's Laws of England, 3rd ed., Vol. 22 (1958), p. 192. The contract must be looked at to see under what law it falls to be considered.

LORD DENNING M.R. We are here concerned with a Lloyd's jewellers' block policy. In 1964 underwriters at Lloyd's issued a policy covering three European companies who deal in diamonds and precious stones. One company is incorporated in Switzerland, another in Belgium and the third in Italy. I will call them the diamond merchants. The policy covered the diamond merchants against loss or damage to their stock of jewellery and precious stones. It was a time policy for one year from April 16, 1964, to April 15, 1965. It covered their goods anywhere in the world. The total sum insured was £450,000. The premium was £4,675. The policy contained a foreign jurisdiction clause in these terms:

> "Notwithstanding that this policy has been effected in London, England, this policy shall be governed exclusively by Belgian law and any disputes arising thereunder shall be exclusively subject to Belgian jurisdiction, it being agreed that all summonses, notices or processes requiring to be served upon the underwriters for the purposes of such jurisdiction shall be deemed to be properly served if addressed to them and delivered to them care of Lloyd's agent at Antwerp."

In January 1965 a loss occurred in Naples. Mr. Myer was the representative in Italy of the diamond merchants. He was in Naples on business, carrying nearly the whole of his stock with him, diamonds and pearls worth nearly £50,000. All were in a small brief-case which he carried but he had it tied to his wrist

A with a steel chain. He was talking to a friend outside a shop when he was jostled. The brief-case was snatched from him. The steel chain was broken or cut. All the diamonds and pearls were gone. The diamond merchants made a claim on Lloyd's underwriters for the loss. The precise figure was £48,266. The underwriters engaged assessors to look into the claim. As the B result of the investigation they discovered, so they said, that the diamond merchants made a practice of smuggling diamonds into Italy. They employed couriers to evade the Italian customs. It is said that Mr. Myer may be prosecuted in Italy for illegally importing diamonds.

C After considerable negotiation, Lloyd's underwriters rejected the claim. They say that it is contrary to English policy to insure goods which are intended to be smuggled into a friendly foreign country. They also say that the diamond merchants were guilty of non-disclosure and that they failed to disclose that it was in the course of their business to smuggle goods into a friendly D foreign country. Lloyd's underwriters say that if they had known of this fact, they would not have undertaken the insurance.

Where is the dispute to be tried? Lloyd's underwriters would like it tried in England. They have issued a writ in the English courts asking that the policy be declared void for illegality and voidable for non-disclosure, and that it be rescinded or annulled. E They applied for leave to serve this writ out of the jurisdiction on the diamond merchants. Roskill J. granted leave ex parte. McNair J., after hearing the diamond merchants, affirmed the decision. Now the diamond merchants appeal to this court. They point out that the policy contains the foreign jurisdiction clause and they ask that this dispute be decided in Belgium. F The diamond merchants have themselves filed proceedings in the Belgian court claiming payment of this £48,266 on account of the loss. They appear to have obtained leave from the Belgian courts to serve proceedings on Lloyd's underwriters and those proceedings are being carried on in Belgium. The question we have to decide is whether the English proceedings should now G be continued.

The rules of court are wide enough to cover the case for service out of the jurisdiction. R.S.C., Ord. 11, r. 1 (*f*), says that it is permissible if an action is brought to annul or otherwise affect a contract "made within the jurisdiction." This contract was undoubtedly made within the jurisdiction. The negotiations between the underwriters and the brokers were here in London,

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the slip signed here, and the policy issued out of and signed at Lloyd's policy signing office.

But although there is jurisdiction to give leave, it is a matter of discretion as to whether it should be granted. Mr. Dunn for the diamond merchants says that, in view of the foreign jurisdiction clause, the court should not give leave. But Mr. MacCrindle for the underwriters says that the foreign jurisdiction clause ought not to be given such importance in this case. He says that the foreign jurisdiction clause only applies where a contract has been truly created and formed. Here he says that owing to the non-disclosure, there was no true contract—no real consent by the underwriters—and that, on this basis, the contract itself falls down, including even the foreign jurisdiction clause.

I can well see that if the issue was whether there ever had been any contract at all, as, for instance, if there was a plea of non est factum, then the foreign jurisdiction clause might not apply at all. But here there was a contract, and when it was made, it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it. They can repudiate the contract and refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is "a dispute arising under" the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract: see *Heyman* v. *Darwins Ltd.*[1]

It seems to me that Mr. MacCrindle's argument (to the effect that non-disclosure strikes out the whole contract) is not well founded. The foreign jurisdiction clause is a positive agreement by the underwriters that the policy is governed exclusively by Belgian law. Any dispute under it is to be exclusively subject to Belgian jurisdiction. That clause still stands and is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction.

As to illegality, I would only say this: the underwriters were clearly innocent. The diamond merchants may have had an unlawful intention to smuggle goods into a friendly foreign

[1] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337, H.L.

country. But their illegality would not affect the formation of the contract. It would only make it unenforceable. It would mean that they could not recover on the policy. This dispute again comes within the foreign jurisdiction clause.

It all comes to this: the English courts have discretion whether or not to give leave to serve this writ out of the jurisdiction. Seeing that the underwriters have agreed to a foreign jurisdiction clause which gives exclusive jurisdiction to the Belgian courts, I think we should allow these disputes to be decided in the courts of Belgium. We should not give leave to serve this writ out of the jurisdiction.

I would therefore allow the appeal.

DIPLOCK L.J.: The contract which is the subject-matter of these proceedings was undoubtedly made in England. The slip was initialled in London and the policy signed on behalf of underwriters by the manager of Lloyd's policy signing office there. The English High Court accordingly had power to give leave to serve the writ upon the defendants outside the jurisdiction, and unless service is set aside and the action stayed, it will have jurisdiction to hear and to determine it. But leave to serve a writ outside the jurisdiction is always discretionary. The jurisdiction which the High Court claims over defendants who are neither present nor ordinarily resident in this country, when it grants leave under R.S.C., Ord. 11, is wider than any corresponding jurisdiction which it recognises as possessed by a foreign court over defendants who are not present or ordinarily resident in the foreign state. And because it is a claim which conflicts with the general principles of comity between civilised nations, it is one which should be exercised with caution. I cannot do better than echo the words of Scott L.J. in *George Monro Ltd.* v. *American Cyanamid & Chemical Corporation*[2]:

> "Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticise very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of R.S.C., Ord. 11."

[2] [1944] K.B. 432, 437; 60 T.L.R. 265, 266; [1944] 1 All E.R. 386, 388, C.A.

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The application for leave to serve a writ outside the jurisdiction under R.S.C., Ord. 11, is made ex parte. On that application, which in the present case came before Roskill J., the only question on which he had to satisfy himself was whether the subject-matter of the action prima facie falls within the ambit of R.S.C., Ord. 11. If it does and leave is granted, the question whether the court in its discretion should allow the action to proceed falls for decision when the defendant has entered a conditional appearance and applies to have service set aside and the proceedings stayed. The application in this case came before McNair J. and it is his exercise of his discretion in refusing the application which this court is asked to review.

The defendants' case is simple. It needs no subtlety of exposition.

> "You underwriters," they say, "in order to get this business, agreed with us, who carry on business in civil law countries, that the policy should be governed by Belgian law upon which we can readily obtain advice from our own lawyers at home, and, what is more important, you undertook to accept the exclusive jurisdiction of the Belgian courts, with which our lawyers at home are familiar, to hear and determine any disputes arising under it. All we ask is that you should keep your word."

The plaintiffs' answer is that the foreign jurisdiction clause does not apply to the particular disputes which they seek to have determined in this action in the English court. They claim that the policy either was void for illegality in English law or was voidable for non-disclosure by the assured of material facts, and they have elected to avoid it. Disputes of these kinds, they contend, are not disputes arising under the contract but are disputes as to whether there is a contract at all.

I will deal first with illegality in isolation from non-disclosure. The policy was a jewellers' block policy insuring the stock-in-trade of the defendants against all risks, with certain exceptions. It is alleged by the underwriters that the defendants in the course of their business habitually traded in uncustomed goods, that is to say, they smuggled them across the frontier into Italy in contravention of the Italian revenue law. It is relevant to note that one of the excepted perils under the policy is "confiscation or requisition or destruction of or damage to property by or under the order of any government or public or local authority." The insurance is not one of indemnity against the consequences of smuggling. How then is the claim that the policy was void for illegality put? It is

said that the adventure insured was "tainted" with illegality, not under Belgian law but under English law. This is a picturesque metaphor which invites analysis. English courts will not enforce an agreement, whatever be its proper law, if it is contrary to English law, whether statute law or common law; nor will they enforce it even though it is not contrary to English law if it is void for illegality under the proper law of the contract. Furthermore, subject to one exception, the English courts will not enforce performance or give damages for non-performance of an act required to be done under a contract, whatever be the proper law of the contract, if the act would be illegal in the country in which it is required to be performed. The exception, the precise scope of which is unsettled and need not be determined in the present case, is where the illegality is a breach of a revenue or fiscal law of a foreign state.

But unenforceability and voidness are not the same concept. To analyse the difference it is convenient to distinguish between an "agreement," which requires no more than a consensus ad idem between the parties, and a "contract," which is an agreement plus something more. Where an agreement is wholly unenforceable because it is contrary to English law, it may, if the proper law of the agreement is itself English law, accurately be said to be void as a contract, that is, not to be a contract at all. For a contract is a species of agreement which gives rise to legally enforceable rights and duties; and an agreement which is contrary to English law, if that is also its proper law, gives rise to none. But if an agreement, though contrary to English law, e.g., a marriage brokage contract, is not illegal by its proper law, it cannot properly be said to be void and thus not a contract at all. It does give rise to rights and duties which are legally enforceable elsewhere than in England. It is a contract, but one which is unenforceable in the English courts. A fortiori a contract which is not illegal by its proper law, but requires for its performance an act to be done which would be illegal under the law of the country where the act is required to be done, is not void. It is a contract which is, in a particular respect only, unenforceable in the English courts. This is to be contrasted with an agreement which under its foreign proper law is illegal and incapable of giving rise to legally enforceable rights and liabilities under that law. Since the foreign proper law must be looked to for the legal affects of the agreement, such an agreement may properly be said to be void, i.e., not to be a contract at all.

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The proper law of the agreement is thus crucial to the question whether an agreement, which would be illegal under English law, is void as a contract. The prima facie rule of English conflict of laws—more liberal in this respect than many Continental systems—is that the proper law of a contract is that system of law which the parties themselves have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise. In the present case the parties have expressly agreed that the proper law of the policy shall be Belgian law. That they have so agreed must be treated as accepted, so far as the claim that the policy is void for illegality considered in isolation is concerned. What is in dispute in this claim is whether their undoubted agreement, embodied in the policy, which includes their choice of Belgian as its proper law, does give rise to any legally enforceable rights and duties under Belgian law. That in my view is a dispute arising under the agreement, i.e., policy. And that dispute, according to the terms of the policy, must be decided according to Belgian law. The Belgian courts are not only a convenient forum for its resolution: they are the forum to which both parties agreed to submit. It is immaterial whether the English courts would enforce the contract at all or any particular claim under it. No one is asking them to do so.

A claim that a contract is void for illegality does not raise any issue as to whether or not the parties in fact agreed to the terms of the policy, including those in the foreign jurisdiction clause. It concedes that they did, but asserts that their agreement gave rise to no legally enforceable rights or duties. It thus raises no dispute about the consensus ad idem of the parties as to the exclusive jurisdiction of the Belgian courts. But the alternative claim of the underwriters to avoid the contract for non-disclosure of a material fact, it has been ably argued on their behalf, does raise the question as to whether there was a contract at all, and thus the question whether there was any agreement that Belgian law should be the proper law of the contract. This question, it is argued, is to be determined not by Belgian law but by a putative objective proper law, a concept which I find confusing, but which is said in this case to be English law. Furthermore, it is contended that such a question, by whatever law it is to be determined, is not a dispute arising under the policy within the meaning of the foreign jurisdiction clause.

This argument, I think, is misconceived. It is based upon an imprecise use of the phrase "avoid the contract." Where acts

done in England, in this case the oral negotiations between the assured's broker and the underwriters, the initialling of the slip and the signing of the policy, are alleged not to have resulted in an agreement at all (i.e., where there is a plea of non est factum) and the question is whether there was any real consensus ad idem, it may well be that this question has to be determined by English law and not by the law which would have been agreed by them as the proper law of the contract if they had reached an agreement. But that is not the position when underwriters seek to repudiate a contract upon discovering that material facts were not disclosed to them by their assured before the policy was entered into.

Where English law is the proper law of a contract of insurance and so regulates the legally enforceable rights and duties of the parties arising under their agreement, among the incidents or legal characteristics in English law of a contract of insurance (which distinguishes it from most other contracts) is the right of the insurer, if he discovers that some material fact has not been disclosed to him by the assured during the negotiations for the contract, to elect either to continue to perform the contract and to require its continued performance by the assured, or to repudiate the contract, that is to say, to treat it as at an end so far as concerns any future performance. If he elects to repudiate the contract, consequential rights and duties as respects acts already done under the contract, such as premiums already paid or claims already met, are other incidents or legal characteristics of the contract under English law. Any disputed claim by an insurer to exercise all or any of these rights which arise upon discovering that there has been non-disclosure of a material fact is in my view clearly a dispute under the contract and falls within the foreign jurisdiction clause.

The fallacy in the argument to the contrary is that when what is said to be a "voidable" contract is said to be "avoided," that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that upon its ceasing there may then arise consequential rights in respect of things done in performance of it while it did exist which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of non est factum which prevents a contract ever coming into existence at all. It is argued that innocent misrepresentation or, in the case of contracts of insurance, non-disclosure of material facts vitiates consent and makes the apparent consent of

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the party misled, no consent at all. But this is specious. What is really meant is that the party did in fact consent but would not have done so if he had known then what he knows now. Fraud may raise other considerations into which it is not necessary to go.

Whether one of the legal incidents or characteristics of the contract of insurance in the present case is that the underwriters are entitled to repudiate for the non-disclosure of the particular facts which they alleged have not been disclosed must be determined by the proper law of the policy, which is Belgian law and not English law. So here again the Belgian courts, to which the parties have expressly agreed to submit this kind of dispute, is a forum conveniens.

Finally, is this a case where we should interfere with the exercise of his discretion by McNair J.? I agree with my Lord that it is. The judge sets out three reasons which influenced him in exercising his discretion to allow the English action to proceed. The first reason was that in his view neither of the disputes were disputes which fell within the foreign jurisdiction clause. I have already indicated that in my view he was mistaken in law in so holding. The second reason was his view upon the evidence before him at that time that the Belgian courts would not have jurisdiction to determine the disputes which the underwriters desired to raise in the English action. Further evidence has been filed to show that in that respect he was mistaken upon the facts as to Belgian law. The third reason, as I understand it, was that he took the view that there would be no inconvenience in having two sets of proceedings because in point of fact the proceedings in England and the proceedings in Belgium could not deal with the same issues. That was founded upon the view that the Belgian courts had no jurisdiction to entertain the dispute which the underwriters desired to raise.

I think, therefore, that the judge exercised his discretion upon a wrong view of English law and a wrong view of the facts as to Belgian law. That entitles us in this court to exercise our discretion de novo unfettered by the way in which the judge exercised his. Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reasons to induce me to permit one of them to go back on his word. The assureds are a Belgian parent company and its Italian and Swiss subsidiaries. As I have said, I do not doubt that one of the inducements to the assureds to

enter into this contract at all was the undertaking that any disputes would be settled in Belgium either by arbitration or by the courts of the parent company's own country with whose language they are familiar and which apply a law upon which they can readily obtain advice from the parent company's own lawyers in their own land.

It is said, on the other hand, that the oral evidence which is required to raise the defences which the underwriters desire to raise is evidence which can most conveniently be given in England because it consists primarily of negotiations between the underwriters and the brokers who were based in London. I am not impressed by this ground for disregarding the express agreement of the parties. Antwerp is not very far away. Brokers and underwriters can go there to give their evidence if this is necessary under Belgian procedure.

The second ground put forward is that if the action in this country is stayed, the underwriters will not be able to raise before the Belgian courts a defence on which they wish to rely that the agreement, even if legal under Belgian law, was illegal under English law. But if the underwriters think that that defence is one which is worth persisting in, either as a matter of law or as a matter of business, they will have an opportunity of doing so under section 4 (1) (*a*) (v) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, if judgment on the assureds' claim is given against them in the Belgian courts and attempts are made to enforce it in this country. I have already indicated the nature of the facts which are said to give rise to this defence. Whether on further reflection the underwriters will wish to take it, I do not know.

RUSSELL L.J.: I agree that service of the notice of the writ should be set aside. Here the parties undoubtedly entered into a contract, and so far as non-disclosure is concerned, the question for judicial decision is whether under the law governing the contract one party can say that there was non-disclosure such as to confer upon that party the right to elect to treat this contract as not binding upon him, and, if so, upon what terms. The parties have in terms agreed that the law governing the contract is Belgian law. I see no reason why in such a case there is need to search for some other law. To do so would seem to introduce a wholly unnecessary complication into the affair. The case does not involve either non est factum or fraud or even innocent misrepresentation and I say nothing as to such cases. So far as illegality and English

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policy are concerned, I add nothing to what has been already said. I am not impressed by the suggestion which was made that the arguments are in any way capable of being raised in these courts against registration of a foreign judgment if obtained by the insurers and that therefore they might as well be allowed to be raised now in this action. I am content to wait and see.

Appeal allowed with costs. Order for service and service itself set aside.

Leave to appeal to House of Lords refused.

Solicitors: *Ince & Co.; Waltons, Bright & Co.*

A. H. B.

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LORD PARKER C.J., WINN L.J. and WIDGERY J.

GREEN v. MINISTER OF HOUSING AND LOCAL GOVERNMENT

Evidence—Fresh evidence—Minister's decision—Statutory appeal to High Court—Right of appeal on point of law—Minister's dismissal of appeal in view of inspector's finding of fact—Fresh evidence casting doubt on finding of fact—Power of court to receive—R.S.C. (*Rev.* 1965) (*S.I.* 1965 *No.* 1776), *Ords.* 55, 94—*Town and Country Planning Act*, 1962 (10 & 11 *Eliz.* 2, *c.* 38), *s.* 180 (1).[1]

Town Planning—Appeal from Minister—Fresh evidence—Appeal on point of law—Dismissal by Minister of appeal against enforcement notice—Minister's decision based on inspector's finding of fact—Fresh evidence casting doubt on inspector's finding of fact—Jurisdiction of court to receive—R.S.C. (*Rev.* 1965), *Ords.* 55, 94—*Town and Country Planning Act*, 1962, *s.* 180 (1).

The appellant appealed to the Minister of Housing and Local Government against an enforcement notice, dated March 30, 1965, served on him alleging development of certain land by

[Reported by GRAHAM GARNER, ESQ., Barrister-at-Law.]

[1] Town and Country Planning Act, 1962, s. 180: "(1) Where the Minister gives a decision in proceedings on an appeal . . . against an enforcement notice, the appellant . . . on whom the enforcement notice was served . . . may, according as rules of court may provide, . . . appeal to the High Court against a decision on a point of law. . . ."

A

[HOUSE OF LORDS]

PAAL WILSON & CO. A/S . . . . . RESPONDENTS AND CROSS-APPELLANTS

AND

B

PARTENREEDEREI HANNAH BLUMENTHAL . . . . . APPELLANTS AND CROSS-RESPONDENTS

1981 July 6, 7 — Staughton J.

1982 Feb. 24, 25, 26; March 26 — Lord Denning M.R., Griffiths and Kerr L.JJ. C

1982 Oct. 26, 27, 28; Dec. 2 — Lord Diplock, Lord Keith of Kinkel, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman

Arbitration — Injunction to restrain — Delay in prosecuting claim — Inordinate and inexcusable delay in prosecution of claim — Delay rendering satisfactory trial of issues impossible — Whether arbitration agreement discharged by frustration or abandonment D

Ships' Names—Hannah Blumenthal

A contract made in 1969 for the sale of a ship contained a clause for arbitration in London. The buyers complained of engine defects and in 1972 the buyers and sellers each E appointed an arbitrator but did not arrange for the appointment of a third arbitrator as required by the contract. By their points of claim served in February 1974 the buyers alleged that before the contract was entered into the sellers had made representations, mainly oral, as to the ship's performance and that the representations were untrue. In their defence delivered in June 1974 the sellers denied having made the representations and in November 1974 obtained F consents to amendments. No further steps were taken in the arbitration for three years. Between September 1977 and May 1978 there were communications between the parties' solicitors relating to discovery and in November 1978 the buyers' solicitors received the ship's log books from the sellers' solicitors. In December 1979 the buyers' solicitors informed the sellers' solicitors that they were shortly expecting an G expert report on the ship's log books that had been in preparation, and their next letter on July 30, 1980, enclosed the report and suggested that a date be fixed for the hearing of the arbitration. In 1979 and 1980 the sellers' solicitors were trying to trace witnesses who might be able to give evidence at the hearing. Neither party at any stage applied to the arbitrators for directions.

In August 1980 the sellers issued proceedings for a declaration that the arbitration agreement had been discharged by H repudiation, consensual rescission or frustration. Staughton J. held that on the facts there was no agreement to abandon the arbitration and that in the light of the decision of the House of Lords in *Bremer Vulkan Schiffbau und Maschinen-*

fabrik v. *South India Shipping Corporation Ltd.* [1981] A.C. 909 it was not open to him to find that the buyers had repudiated the arbitration agreement. He held, however, that the agreement had been discharged by frustration. The Court of Appeal by a majority dismissed an appeal by the buyers on the ground that in view of the long period of time that had elapsed and the nature of the dispute, it would be impossible for there to be a fair trial of the buyers' claim, and that since, therefore, the arbitration if it took place would be radically different from what the parties contemplated when they made the agreement, the arbitration agreement had been frustrated. A majority of the court also concurred with Staughton J.'s decision on repudiatory breach and abandonment.

On appeal by the buyers, and cross-appeal by the sellers on the question of abandonment:—

Held, (1) allowing the appeal, that an arbitration agreement could not be frustrated by such delay by either or both parties in preparing for the arbitration and bringing it to a hearing that a satisfactory trial of the dispute was no longer possible, because both parties had a mutual obligation to one another to apply to the arbitral tribunal for directions to prevent such delay, and a failure to comply with the obligation was a "default" which excluded the operation of the doctrine of frustration; and that since both sellers and buyers had been guilty of such delay in breach of their obligations, the arbitration agreement had not been frustrated (post, pp. 910D–H, 919H—920B, B–C, 923A–B, E).

Per curiam. The mutual obligation principle is part of the ratio decidendi of *Bremer Vulkan*, and there is no reason for departing from that decision, especially in view of the particular need for certainty in the area of commercial law (post, pp. 909C–D, 912D–E, 917D–E, 920B–C, 922G—923A, E–F).

Bremer Vulkan Schiffbau und Maschinenfabrik v. *South India Shipping Corporation Ltd.* [1981] A.C. 909, H.L.(E.) applied.

Per Lord Diplock. The virtual impossibility of a satisfactory trial by the arbitral tribunal is incapable of qualifying as a frustrating event even if it has come about without default by either party (post, p. 919E–F).

(2) Dismissing the cross-appeal, that the sellers could only establish that the arbitration had been abandoned by apparent inaction of the buyers in reliance on which the sellers acted to their detriment if they could prove not only that the buyers' conduct was such as to induce a reasonable belief that they intended to abandon the arbitration, but also that the sellers did in fact believe that the buyers so intended and that they themselves acted accordingly; and that since the facts disclosed acts by the sellers which were inconsistent with such belief or reliance, no case for abandonment had been made out (post, pp. 914A–E, 916F—917A, 920B–C, 923C–D, 924D—925A).

Decision of the Court of Appeal, post, p. 869C; [1982] 3 W.L.R. 49; [1982] 3 All E.R. 394 reversed in part.

The following cases are referred to in the opinions of their Lordships in the House of Lords:

Aello, The [1961] A.C. 135; [1960] 3 W.L.R. 145; [1960] 2 All E.R. 578, H.L.(E.).

A the law of contract a novel heresy which your Lordships should, in my view, be vigilant to reject.

Applying the orthodox concept of termination of contract by abandonment, neither the trial judge nor any member of the Court of Appeal was prepared to hold that the sellers were entitled to succeed on this ground; and even if your Lordships yourselves felt some doubt upon this issue, which I myself do not, I agree with my noble and learned friends that your B Lordships would hesitate long before upsetting the unanimous decision of the judges in the lower courts on what, upon a proper application of the law of contract, is essentially a question of fact.

In considering the question of abandonment, I found of great assistance the tabulated chronology of events which the parties agreed and tendered to your Lordships after the cases had been prepared. Your Lordships may C feel that such a chronology would be welcome and time-saving in many other appeals, particularly if lodged before the start of the hearing.

My Lords, as respects the propriety of this House declining to follow its own recent decision in *Bremer Vulkan* [1981] A.C. 909 I have nothing to add to what is said on this topic by my noble and learned friends, Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman. Even if I had been persuaded, as unrepentantly I have not, that of the two eminently D possible views in *Bremer Vulkan*, the majority of the House, speaking through me, made the worse and not the better choice, I would nonetheless agree with my Lords that in the interests of legal certainty we should abide by it.

I turn finally to the question whether it is possible to escape the consequences of the decision in *Bremer Vulkan* by resorting to the E doctrine of frustration of the arbitration agreement as Staughton J., ante, p. 859A and the majority of the Court of Appeal, ante, p. 869C (Lord Denning M.R. and Kerr L.J.) thought that they could do; and on this aspect of the case, I think it helpful to start by analysing the legal characteristics of an arbitration clause in a commercial contract.

The first characteristic is that which was established by this House in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356. An arbitration clause is col- F lateral to the main contract in which it is incorporated and it gives rise to collateral primary and secondary obligations of its own. Those collateral obligations survive the termination (whether by fundamental breach, breach of condition or frustration) of all primary obligations assumed by the parties under the other clauses in the main contract. In saying this I do no more than paraphrase in the nomenclature I adopted in *Photo Production Ltd.* G v. *Securicor Transport Ltd.* [1980] A.C. 827, what was said by Lord Macmillan in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 374.

The second characteristic of an arbitration clause is that the primary obligations that it creates are subject to conditions subsequent. The clause comes into operation so as to impose primary obligations upon the parties to the contract only upon the occurrence of a combination of future events which may or may not occur, viz., (1) the coming into existence of a dispute H between the parties as to their primary or secondary obligations under the main contract; and (2) the invoking of the arbitration clause by a party to the contract (" the claimant ") who desires to obtain the resolution of that dispute by the procedure for which the arbitration clause provides. It

Court of Appeal

*Sulamérica Cia Nacional de Seguros SA and others *v* Enesa Engelharia SA and others

[2012] EWCA Civ 638

2012 March 20; May 16

Lord Neuberger of Abbotsbury MR, Moore-Bick, Hallett LJJ

Conflict of laws — Contract — Arbitration agreement — Insurance policy expressly governed by Brazilian law containing exclusive jurisdiction clause in favour of Brazilian courts and London arbitration clause — Insurers denying liability for claims made by insured under policy — Insurers giving notice of arbitration — Insured obtaining Brazilian injunction restraining insurers from continuing with arbitration claim — Proper law governing arbitration agreement — Whether English law — Whether insurers entitled to anti-suit injunction to restrain insured from pursuing Brazilian proceedings

The insured, Brazilian companies involved in the construction of a hydroelectric generating plant in Brazil, made claims under two insurance policies. The insurers denied liability on the grounds that the losses were uninsured or excluded under the terms of the policies, or for material non-disclosure by the insured. The policies, which were in substantially the same terms, contained an express choice of Brazilian law as the governing law of the contract, an exclusive jurisdiction clause in favour of the Brazilian courts, and mediation and arbitration clauses, whereby the parties undertook that, prior to a reference to arbitration, they would seek to have any dispute resolved by mediation, and that if they failed to agree the amount due through mediation the dispute would be referred to arbitration, the seat of the arbitration being London. Either party was entitled to refer the dispute to arbitration. The insurers gave notice of arbitration without referring the dispute to mediation. The insured obtained an injunction in Brazil restraining the insurers from pursuing arbitration proceedings, whereupon the insurers applied to the English court for, and were granted, an ex parte interim injunction to restrain the insured from pursuing proceedings in Brazil. Following an inter partes hearing the judge continued the injunction, holding that the agreement to arbitrate had its closest and most real connection with English law because of the choice of London as the seat of the arbitration and that accordingly English law was the proper law of the arbitration agreement.

On the insured's appeal—

Held, dismissing the appeal, that whether the proper law of an arbitration agreement in a commercial contract was the governing law of the contract or the law of the seat of the arbitration was a matter of contractual interpretation and thus depended on all the terms of the particular contract read in the light of the surrounding circumstances and commercial common sense; that where an arbitration agreement formed part of a substantive contract, although the governing law might be different from that of the substantive contract, it was to be assumed that, in the absence of an indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law; that the proper law of the arbitration agreement was to be determined by a three-stage inquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection, those three stages to be considered separately and in that order; that since an express choice of law governing the substantive contract was a strong indication of the parties' intention in relation to the law of the arbitration agreement, a search for an implied choice of proper law for the arbitration agreement was likely to indicate an intention that the same law was to govern both the substantive and arbitration agreements unless other factors pointed to a different conclusion; that, although there were

A powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement, the choice of another country as the seat of the arbitration imported an acceptance of the laws of that country as applying to the proceedings, and the choice of the law of Brazil, since it would render the arbitration agreement enforceable only with the consent of the insured, was inconsistent with the unqualified provision for arbitration in the arbitration clause and likely to render it ineffective; that it followed that the parties had not made an implied choice of B Brazilian law to govern the arbitration agreement; that an agreement to resolve disputes in London in accordance with English arbitral law did not have a close juridical connection with the system of law governing the insurance policy, the purpose of which was unrelated to that of dispute resolution, rather its closest and most real connection was with the law of the place where the arbitration was to be held; and that, accordingly, the arbitration agreement was governed by English law and the injunction restraining the insured from pursuing the Brazilian proceedings C should continue (post, paras 11, 25–26, 29–32, 47, 48, 49, 51, 60–62).

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, HL(E), *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 and *C v D* [2008] Bus LR 843, CA considered.

Decision of Cooke J [2012] EWHC 42 (Comm); [2012] 1 Lloyd's Rep 275 affirmed.

The following cases are referred to in the judgments:

D *Ace Capital Ltd v CMS Energy Corpn* [2008] EWHC 1843 (Comm); [2009] Lloyd's Rep IR 414

Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446

C v D [2007] EWCA Civ 1282; [2008] Bus LR 843; [2008] 1 All ER (Comm) 1001; [2008] 1 Lloyd's Rep 239, CA

Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm); E [2002] 2 All ER (Comm) 1041

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334; [1993] 2 WLR 262; [1993] 1 All ER 664; [1993] 1 Lloyd's Rep 291, HL(E)

Fiona Trust and Holding Corpn v Privalov [2007] UKHL 40; [2007] Bus LR 1719; [2007] 4 All ER 951; [2007] 2 All ER (Comm) 1053; [2008] 1 Lloyd's Rep 254, HL(E)

Holloway v Chancery Mead Ltd [2007] EWHC 2495 (TCC); [2008] 1 All F ER (Comm) 653

Leibinger v Stryker Trauma GmbH [2006] EWHC 690 (Comm)

Sonatrach Petroleum Corpn (BVI) v Ferrell International Ltd [2002] 1 All ER (Comm) 627

Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep 45

XL Insurance Ltd v Owens Corning [2001] 1 All ER (Comm) 530; [2000] 2 Lloyd's G Rep 500

The following additional cases were cited in argument:

Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm); [2012] 1 Lloyd's Rep 461

Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'As as-Khaimah National Oil Co [1990] 1 AC 295; [1987] 3 WLR 1023; [1987] 2 All ER 769; [1987] H 2 Lloyd's Rep 246, CA

Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru [1988] 1 Lloyd's Rep 116, CA

Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2005] EWHC 2437 (Comm); [2006] 1 All ER (Comm) 731; [2006] 1 Lloyd's Rep 181

arbitration would be ineffective and the injunction would have to be discharged. A

8 The judge held that the proper law of the arbitration agreement in this case was English law, notwithstanding the express choice of Brazilian law as the law governing the policies and the obvious connection of the policy to Brazil. He considered at para 10 that the key question was the weight to be given to the choice of London as the seat of the arbitration. He pointed out that the choice of the seat of the arbitration determines the curial law and the supervising jurisdiction of the courts of the country where the seat is located, in this case England. That led him to the clear conclusion at para 15 that the law with which the agreement to arbitrate had its closest and most real connection was the law of England. B

9 It was common ground before us, as it had been before the judge, that the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognise and give effect to the parties' choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection: see *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), para 16R-001. It was also common ground that an arbitration agreement forming part of a substantive contract is separable, in the sense that it has an existence separate from that of the contract in which it is found. That principle, which reflects the presumption that the parties intended that even disputes about matters which, if established, would undermine the intrinsic validity of the substantive contract (such as fraudulent misrepresentation) should be determined by their chosen procedure, has been given statutory recognition by section 7 of the Arbitration Act 1996. In *Fiona Trust and Holding Corpn v Privalov* [2007] Bus LR 1719 the House of Lords re-emphasised both the presumption that parties to a contract who have included an arbitration clause intend that all questions arising out of their relationship should be determined in accordance with their chosen procedure and the separability of arbitration agreements which enables their intention to be effective. C D E F

10 The insured's case is that the parties have impliedly chosen the law of Brazil as the law governing the arbitration agreement. In support of that they rely on three principal factors: the express choice of the law of Brazil as the law governing the policy, coupled with the agreement that the courts of Brazil should have exclusive jurisdiction in respect of any disputes arising under, out of, or in connection with the policy; the close commercial connection between the policy and the state of Brazil (the parties, the subject matter of the insurance and the currency of the policy all being Brazilian and the language in which it is written being Portuguese); and the inclusion of a provision, which is itself governed by the law of Brazil, requiring the parties to attempt mediation as a precondition to any reference to arbitration. Of these, most emphasis was placed on the express choice of the law of Brazil to govern the policy, but the insured also relied on the wider commercial and legal context in which the arbitration agreement is set. Although they recognised that the parties had not made an express choice of proper law to govern the arbitration agreement, they submitted that the judge had failed to G H